Supreme Court, U.S.
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96 782 NOV 12 1996
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No.

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1996

THE ESTATE OF MAX G. COLE, by its Administratrix Lois Pardue, AND LOIS PARDUE,

Petitioners,

v.

NANCY BUTLER, individually,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

November 12, 1996

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QUESTION PRESENTED

Whether this Court's decision in *Farmer v. Brennan*, 511 U.S. ___, 114 S. Ct. 1970 (1994), creates an evidentiary exception totally prohibiting prisoners and pretrial detainees from presenting expert testimony to challenge a prison doctor's denial of deliberate indifference when such testimony contradicts the self-serving testimony of the prison doctor?

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OPINION BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported as *Estate of Cole v. Fromm*, 94 F.3d 254 (7th Cir. 1996). It is reprinted in the Appendix at a-1.

JURISDICTION

Plaintiffs-Petitioners Estate of Max G. Cole and Lois Pardue, Cole's mother, sued the defendant doctor under 42 U.S.C. § 1983, for knowingly disregarding a substantial risk of death to Cole. The district court had jurisdiction to hear this case. 28 U.S.C. §§ 1331 & 1343.

On November 27, 1995, the district court entered summary judgment in favor of Dr. Butler and other defendants. Plaintiffs filed their Notice of Appeal on December 26, 1995. The court of appeals had jurisdiction under 28 U.S.C. § 1291.

On August 12, 1996, the court of appeals affirmed and issued its judgment. This Court has jurisdiction under 28 U.S.C. § 1254(1). November 10, 1996, was a Sunday and November 11, 1996, was a federal holiday.

CONSTITUTIONAL PROVISION INVOLVED

The following constitutional provision is relevant to the determination of this case: "[N]or shall any state deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. IX.

STATEMENT OF THE CASE

1. Facts. On July 1, 1991, the Marion County Jail transferred Max G. Cole, 18, a pretrial detainee, to Wishard Memorial Hospital because of his several attempts to seriously injure himself and for "running face first into walls." Pl. Ex. 25. He was screaming "nobody cares about me" and was hitting his head against the wall. Pl. Ex. 3. Cole was placed in 4-way restraints at the BU2 unit until further evaluation by Dr. Butler. *Id.*

Dr. Butler was a psychiatrist and the medical director of the BU2 unit. *Butler's Depo.* at 5 (R. 63). Dr. Butler was responsible for promulgating and approving the patient care policies, including the potential suicide precautions policy, at the BU2 unit. *See e.g.* Pl. Ex. 11.

Dr. Butler first saw Cole on July 2, 1991. *Butler's Depo.* at 19. Her notes confirm Cole was admitted to the BU2 unit for "banging head against wall and self injurious behavior at jail." Pl. Ex. 2. Cole repeatedly told Dr. Butler that he heard voices telling him to commit suicide and that he hated life. Pl. Ex. 2, 3, 5 & 25. Dr. Butler placed Cole under "assault, elopement, and suicide precautions." *Butler's Depo.* at 18. She continued Cole's commitment at the BU2 unit, *Id.* at 24, and kept him there for the entire period of his commitment. *Id.* at 116.

The BU2 unit is a small and secured unit, (R. 54, Ex. 2), to which only "people who are dangerous or extremely gravely disabled" are admitted. *Butler's Depo.* at 18. It is reserved for unstable patients who demonstrate acute psychiatric problems. *Id.* at 18.

On July 3, 1991, Dr. Butler again examined Cole. *Butler's Depo.* at 25. Cole was depressed, and reported having hallucinations and hearing voices telling him to commit suicide. Pl. Ex. 5 (Dr. Butler's notes). Dr. Butler kept Cole on "potential suicide" status during his entire period of commitment. *Butler's Depo.* at 116.

Cole's medical records were kept on the unit for staff review. *Fromm's Depo.* at 18-19. They conspicuously show he was on "potential suicide" status. Pl. Ex. 16-19 (seclusion and restraint records for July 1-4, 1991).[1] Dr. Butler reviewed the medical charts of her patients on a daily basis. *Butler's Depo.* at 32.

On July 4, 1991, "Cole committed suicide by suffocating himself with a plastic sanitary liner obtained from one of the soiled linen hampers on the BU2." *Spires' Depo.* at 29-30.

Plastic bags similar to the one used by Cole to commit suicide are located in the unit's laundry hamper. The nursing staff all admitted they *knew* plastic bags similar to the one with which Cole killed himself were available on the BU2. *Fromm's Depo.* at 68; *Easton's Depo.* at 30-31; *Beck's Depo.* at 19; *Morris' Depo.* at 30; *Spires' Depo.* at 30. Dr. Butler denied knowing plastic bags were being used in the laundry hamper. *Butler's Depo.* at 88. But the evidence allows an inference that she knew.

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[1]Notations PA, PS, & PE are entered on the forms. PA stands for "potential assault," PS for "potential suicide," and PE for "potential elopement." *Fromm's Depo.* at 26.

Dr. Butler admitted she *knew* plastic bags are used for committing suicide. *Butler's Depo.* at 116. Nurse Easton testified plastic bags are dangerous, especially, to patients on "potential suicide" status. *Easton's Depo.* at 35.

> Q. Do you now know that plastic bags can be dangerous to a person who is on potential suicide watch?
>
> A. Repeat the question.
>
> Q. Do you now know that plastic bags can be dangerous to a person who is on a suicide watch?
>
> A. Yes.
>
> Q. Or potential suicide watch?
>
> A. Yes.

Beck's Depo. at 20-21.

Plaintiffs presented an affidavit by Dr. Larry M. Davis, a psychiatrist with 21 years of experience and a Diplomate of the American Board of Psychiatry and Neurology. Dr. Davis opined:

> *The danger* presented by the plastic bags in the trash can and the laundry hamper on the BU2 unit [was] *obvious and significant, and constituted a substantial risk of serious harm, and significant risk of death, to a "potential suicide" patient such as Mr. Cole.*

Dr. Davis' Affidavit ¶¶ 4, at 3 (A-27) (emphasis added).[2]

Dr. Davis' opinion was based, in part, on the following premises:

> Plastic bags are very dangerous items. They can cause death by suffocation. The consensus among psychiatrists and mental health workers is that plastic bags are dangerous.
>
> The knowledge of the danger associated with plastic bags is not limited to mental health professionals. Over the past decades there have been a number of campaigns to educate the public at large regarding the danger of plastic bags. This is best demonstrated by the warnings labels which are printed on most plastic bags in circulation today.
>
> During his entire stay at the BU2 unit, Mr. Cole was on "potential suicide" status. The plastic bags in the trash can and the laundry hampers on the BU2 unit presented a substantial risk of serious harm and a significant risk of death to Mr. Cole.

Dr. Davis' Affidavit ¶¶ 1-3, at 2-3 (A-26 to -27).

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[2]References to Plaintiffs-Appellants' Brief in the Seventh Circuit are denoted as A-___.

Dr. Butler was the attending physician in charge of medical care, including mental health care, of Cole. *Butler's Depo.* at 10-11. Yet, Dr. Butler committed Cole to the BU2 unit where plastic bags were available to him. Further, knowing that plastic bags were available on the unit and presented a substantial risk of suicide to a "potentially suicidal" patient, Dr. Butler did not increase Cole's monitoring level. Finally, Dr. Butler, as the medical director, did not take any steps to curtail the availability of plastic bags on the unit.

2. Case History. Plaintiffs brought suit against Dr. Butler and a number of nurses. Defendants moved for summary judgment. The district court granted summary judgment. The Seventh Circuit affirmed. Plaintiffs are seeking a writ of certiorari solely to pursue their claims against Dr. Butler.

REASON FOR GRANTING THE WRIT

The Seventh Circuit's rule totally prohibiting prisoners and pretrial detainees from presenting expert testimony to challenge a prison doctor's denial of deliberate indifference is in conflict with the decisions of the Eighth and the Eleventh Circuits.

Dr. Butler denies knowing plastic bags were being used in the laundry hamper. *Butler's Depo.* at 88. But

the evidence allows an inference that she *knew*.[3] The court of appeals agreed on that point. 94 F.3d at 258 (a-4).

To show Dr. Butler *knew* plastic bags presented a serious risk of suicide to a "potentially suicidal" patient such as Cole, Plaintiffs presented the expert testimony of a psychiatrist:

> *The danger* presented by the plastic bags in the trash can and the laundry hamper on the BU2 unit [was] *obvious and significant, and constituted a substantial risk of serious harm, and significant risk of death, to a "potential suicide" patient such as Mr. Cole.*

Dr. Davis' Affidavit ¶¶ 4, at 3 (A-27) (emphasis added).

This Court's decision in *Farmer v. Brennan*, 511 U.S. ___, ___, 114 S. Ct. 1970, 1981 (1994), holds that the subjective knowledge of a risk of harm may be inferred

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[3]Both courts below agreed the evidence allows the inference. Dr. Butler has been the medical director of the unit since December of 1985, Curriculum Vitae of Nancy E. Butler, M.D., at 2 (Ex. A). She handles about 20-23 patients a day, *Butler's Depo.* at 7, and works on the psychiatry ward on a daily basis. *Id.* at 54. BU2 is a small unit, *Fromm's Depo.* at 9, and evidence shows the plastic bags used in laundry hampers were displayed in an open and obvious manner. *Easton's Depo.* at 32-33; *Fromm's Depo.* at 137; *Beck's Depo.* at 19; *Spires' Depo.* at 29; *Morris's Depo.* at 31.

from the objective fact that the risk was obvious. *Id.* at ___, 114 S. Ct. at 1981 ("a factfinder may conclude that a prison official knew of a substantial risk from the very fact that the risk was obvious"). The Seventh Circuit recognized this Court's ruling in general, but held that it does not apply to cases involving medical doctors: "Normally, a jury may infer the subjective (awareness of a substantial risk) from the objective (obvi[illegible]sness of a risk). *Cases of medical judgment are different.*" 94 F.3d 261 (a-11) (emphasis added). Thus, the Seventh Circuit held:

> We cannot permit the factfinder to *infer* subjective knowledge of a substantial risk that Cole would harm himself based on Dr. Davis's testimony that the risk was "obvious" because this would conflict with Dr. Butler's subjective medical judgment, evidenced by her diagnosis, the appropriateness of which plaintiffs do not challenge.

94 F.3d at 261 (a-10).[4]

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[4]The court of appeals' justification that plaintiffs have not challenged the "appropriateness" of Cole's diagnosis sidesteps the testimony of Dr. Davis: "The danger . . . [was] obvious and significant, and constituted a . . . significant risk of death, to a *'potential suicide'* patient such as Mr. Cole." *Dr. Davis' Affidavit* ¶¶ 4, at 3 (A-27) (emphasis added). Cole was diagnosed by Dr. Butler as "potentially suicidal." 94 F.3d at 257 (a-3). Assuming Dr. Butler's diagnosis was "appropriate", the evidence still

This Court's decision in *Farmer*, does not make an evidentiary exception for medical professionals. To the contrary, *Farmer* holds that deliberate indifference may be proved by "any relevant evidence," 511 U.S. at ___, 114 S.Ct. at 1984, and allows the factfinder to infer the defendant's knowledge of a risk "from the very fact that the risk was obvious." *Id.* at ___, 114 S. Ct. at 1981. Without allowing an inference to be drawn from objective evidence, plaintiffs would rarely, if ever, be able to establish a prison doctor's subjective knowledge of the risks presented by medical facts.

By contrast, other circuits have followed this Court's instructions in *Farmer* and have allowed plaintiff prisoners, pursuing claims under the eighth amendment, to employ expert witnesses to challenge the defendant doctor's denial of deliberate indifference. In *Miller v. Schienen*, 75 F.3d 1305 (8th Cir. 1996), the Eighth Circuit relied on the testimony of plaintiff's expert to hold that the expert testimony contradicting the prison doctor's assertion of medical judgment precluded summary judgment. *Id.* at 1310. In *Steele v. Shah*, 87 F.3d 1266 (11th Cir. 1996), the Eleventh Circuit went a step further. After reversing and remanding the district court's dismissal of a "potentially suicidal" prisoner's claim that the prison psychiatrist had failed to provide him with proper medication, the court directed the district court to consider appointing an expert to support the plaintiff's claim that

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shows the risk of serious harm to Cole, a "potentially suicidal" patient, was obvious.

the prison doctor had been deliberately indifferent. *Id.* at 1271.

Nevertheless, under the Seventh Circuit's rule prison doctors have achieved near total immunity from constitutional liability. *Snipes v. Detella*, 95 F.3d 586, 591 (7th Cir. Sep. 9, 1996) (a prison doctor may not be held constitutionally liable for extracting the prisoner's toenail *without* local anesthesia). This is so because in the Seventh Circuit no "after the fact" opinion of medical expert may be presented to contradict a prison doctor's self-serving assertion of facts. *Steele v. Choi*, 82 F.3d 176, 178 (7th Cir. 1996), *cert. denied*, ___ S. Ct. ___ (1996). But, an expert opinion is the only avenue for introducing medical facts and almost all experts are retained "after the fact." Without allowing proof through experts, prison doctors can freely, though knowingly, disregard obvious and significant symptoms of a substantial risk of serious harm and avoid liability simply by denying the obvious during litigation. After all, a plaintiff may "rarely be successful in proving awareness of falsehood [another subjective state of mind] from the mouth of the defendant himself." *Herbert v. Lando*, 441 U.S. 153, 170 (1979).

This Court should accept this case to resolve the conflict among the circuits and to explicitly hold that incarcerated individuals are entitled to the same usual methods of proof, which are available to all other citizens, to meet the stringent standard of proof set forth in *Farmer*.

CONCLUSION

For the foregoing reasons, Petitioners Estate of Max G. Cole and Lois Pardue respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

November 12, 1996

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APPENDIX

The Seventh Circuit's Opinion in
Estate of Cole v. Fromm,
94 F.3d 254 (7th Cir. 1996) a-1

The District Court's Entry on
Defendants' Motions for
Summary Judgment a-16

In the

United States Court of Appeals

For the Seventh Circuit

No. 95-4087

THE ESTATE OF MAX G. COLE, by its Administratrix Lois Pardue, and LOIS PARDUE,

Plaintiffs-Appellants,

v.

JACKIE FROMM, PHILL SPIRES, DAN BECK, KATIE GRIER EASTON, CLEMENT MORRIS, and NANCY BUTLER,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Indiana, Indianapolis Division.
No. 93 C 1015—**David F. Hamilton**, *Judge.*

ARGUED APRIL 18, 1996—DECIDED AUGUST 12, 1996

Before BAUER, ESCHBACH, and FLAUM, *Circuit Judges.*

ESCHBACH, *Circuit Judge.* Plaintiffs-Appellants estate of Max G. Cole and Lois Pardue, Cole's mother, ("plaintiffs") appeal from entry of summary judgment in favor of defendants. Max Cole was a pretrial detainee confined to an acute care inpatient psychiatry unit at Wishard Memorial Psychiatry Ward in Indianapolis in July, 1991. Cole committed suicide by asphyxiating himself with a plastic sanitary bag which was used to line a linen hamper in the psychiatry ward. Plaintiffs brought suit against a number of health care providers who assisted in Cole's treatment

in one way or another. Defendant Jackie Fromm was a registered nurse, defendant Katie Grier Easton was a graduate nurse, and defendants Phill Spires, Dan Beck, and Clement Morris were nursing mental health clinicians (collectively, the "nurses"). Defendant Dr. Nancy Butler was a licensed psychiatrist and served as the Inpatient Director and a staff psychiatrist.

Plaintiffs claim that defendants violated Max Cole's due process rights under the Fourteenth Amendment because they were "deliberately indifferent" to the risk that Cole would commit suicide while in their care and that defendants are liable for damages under 42 U.S.C. § 1983. This action was originally instituted in state court. It was removed to federal court by defendants. Defendants moved to dismiss for lack of subject matter jurisdiction and filed motions for summary judgment. The district court granted defendants' motions for summary judgment. We affirm the district court's entry of summary judgment in favor of defendants.

I.

We review the grant of summary judgment *de novo*. Many of the facts in this case are undisputed. We draw all reasonable inferences from these facts in favor of the non-moving party, here the plaintiffs. *Williams v. Ramos*, 71 F.3d 1246, 1248 (7th Cir. 1995). We review the remaining, disputed evidence in the light most favorable to plaintiffs and affirm only if no genuine issue of material fact exists. Fed. R. Civ. P. 56. With the appropriate standard of review in mind, we discuss the relevant facts.

Max Cole was transferred to Wishard because he was "running face first into walls" at the Marion County Jail and had been in a fight with another inmate. Upon his arrival at Wishard Memorial Hospital (the "Hospital"), Cole was treated for abrasions to his face and forehead. Cole was agitated, out of control, and attempted to leave the emergency room. Cole, therefore, was placed in restraints. Dr. Verkota Rao, a physician specializing in

psychiatry, evaluated Cole and determined that he was experiencing symptoms of a drug-induced psychosis. Rao ordered Cole admitted to the Hospital in the BU2 unit, a small and secured unit reserved for unstable patients with acute psychiatric problems. Rao prescribed an anti-psychotic drug for Cole and placed Cole on potential assault, suicide, and elopement precautions at the time of his admission.

Dr. Butler, a board certified psychiatrist and the Hospital's Medical Director of In-Patient Psychiatry, was Cole's attending physician. On July 2, the day after Rao's evaluation and Cole's admittance to the Hospital, Dr. Butler reviewed Cole's medical chart and conducted an independent mental status examination. Cole was depressed and reported having hallucinations telling him to commit suicide. Dr. Butler committed Cole to the BU2 unit. Dr. Butler classified Cole as "potentially suicidal," the lower of the two levels of suicide precautions. Dr. Butler did not believe that Cole was a "high risk" patient even though Cole reported to Dr. Butler that he heard voices telling him to commit suicide, because Cole did not express a present intent to commit suicide. In addition, Cole spoke logically and coherently, Dr. Butler felt that his hallucinations were directed mostly toward hurting others, and Cole disavowed a desire to act on his hallucinations. Dr. Butler concluded that Cole's behavior was more likely caused by drug-induced psychosis than by a personality disorder.

The Hospital has two levels of precautions for patients with possible suicidal tendencies. These levels are labelled "potential suicide precautions" and "high risk suicide precautions." The Hospital requires that a doctor make the decision to institute or to discontinue either of these precautions. The purpose of the "potential suicide precautions" is to "provide ongoing assessment and intervention of patients who exhibit or verbalize suicidal ideations." The policy requires "close observation" and regular, but not constant, monitoring of the patient by the caregiver. Patients subject to "potential suicide precautions" generally move freely about the BU2 unit and they have access

to the restrooms. The policy requires Hospital staff to conduct an initial search for contraband of the areas to which the patient has access and additional searches thereafter on an "as needed" basis.

The purpose of "high risk" suicide precautions is to "provide a safe and therapeutic environment for those patients who exhibit or verbalize serious suicidal intention." Hospital staff provides continuous one-to-one monitoring of patients that are classified "high risk." In addition, the staff carefully searches the patient's room, locker, and personal belongings for contraband both upon initiation of the precautions and during every shift thereafter. None of the nursing defendants had any input into, or responsibility for, the creation or development of the Hospital's suicide risk classification policy. Dr. Butler approved the suicide risk classification policy for implementation.

Dr. Butler last examined Cole on July 3, 1991. Dr. Butler's opinion at that time was that Cole did not need a change in his precautions because he did not exhibit signs suggesting that he was contemplating suicide. On July 4, at 9:55 p.m., Cole came to the dayroom and requested a cigarette from nurse Fromm. Fromm gave Cole a cigarette and Cole told her that he felt better. About 25 minutes later, Cole was found to have committed suicide in his room. Cole was in his bed with the sheets covering himself and he had a plastic bag over his head.

The nursing defendants testified that they knew that the Hospital used plastic bags to line the soiled linen hampers in the two restrooms in the BU2 unit. The Hospital's policy that requires use of the plastic liners was designed to comply with Indiana State Board of Health regulations governing communicable disease control policies. Dr. Butler testified at her deposition that she was not aware that the plastic bags were used in the restroom, but we assume for purposes of this appeal that a reasonable jury could have found that she was aware of the plastic bags. Several of the defendants, including Dr. Butler, admitted that they were aware that plastic bags can be used for committing suicide and all of the nursing

defendants admitted that they would have confiscated a plastic bag from Cole if they had witnessed him obtaining it, which they did not.

There is no evidence, however, that any defendant perceived the presence of the plastic bags in the BU2 unit to be a danger to Cole or other patients. In addition, no person who had worked in the BU2 unit, visited it, or inspected it had ever recognized that the bags posed a risk to the patients and no person had called such risk to the Hospital's attention. Finally, there was no evidence that any BU2 unit patient had ever tried to harm himself or herself with a plastic bag prior to Cole's suicide.

II.

In *Farmer v. Brennan*, 114 S. Ct. 1970 (1994), the Supreme Court held that a prison official may be held liable under the Eighth Amendment for acting with "deliberate indifference" to inmate health or safety only if he knows that the inmate faces a "substantial risk of serious harm" and disregards that risk by failing to take reasonable measures to abate it. The Court rejected an objective test for deliberate indifference and held that liability will lie only if "the official knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." *Id.* at 1979. The Court adopted the definition of "reckless" as defined in criminal law, which "permits a finding of recklessness only when a person disregards a risk of harm of which he is aware." *Id.* at 1978-79. The Court determined, however, that a plaintiff may establish subjective awareness of the risk by proof of the risk's obviousness.

> Whether a prison official had the requisite knowledge of a substantial risk if [sic] a question of fact subject to demonstration in the usual ways, including inference from circumstantial evidence, . . . and a fact-finder may conclude that a prison official knew of a

> substantial risk from the very fact that the risk was obvious.

Id. at 1981 (citations omitted).

In the instant case, Cole was not a prisoner, he was a pre-trial detainee. We have previously held that the due process rights of a pre-trial detainee are at least as great as the Eighth Amendment protection available to a convicted prisoner,[1] and defendants may be liable for Cole's suicide if they were deliberately indifferent to a substantial suicide risk. *Hall v. Ryan*, 957 F.2d 402, 405-06 (7th Cir. 1992); *see also Murphy v. Walker*, 51 F.3d 714, 717 (7th Cir. 1995) ("Pretrial detainees, who are protected by the Due Process Clause, will state a claim for inadequate medical treatment if they allege deliberate indifference to their serious medical needs." (internal quotation and citation omitted)); *Salazar v. City of Chicago*, 940 F.2d 233, 237-41 (7th Cir. 1991) (deliberate indifference standard applies to pre-trial detainee). Plaintiffs note that they are not required to establish that defendants *intended* to harm Cole. *See Haley v. Gross*, 86 F.3d 630, 641 (7th Cir.

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[1] The Eighth Amendment's prohibition on cruel and unusual punishment gives rise to the constitutional rights of a convicted state prisoner. *Estelle v. Gamble*, 429 U.S. 97, 104 (1976). A pretrial detainee's constitutional rights are distinct from a prisoner's rights because the State cannot punish a pretrial detainee. *Bell v. Wolfish*, 441 U.S. 520, 535 & n.16 (1979). Thus, the source of the pretrial detainee's rights is the Fourteenth Amendment's Due Process Clause and the pretrial detainee's rights are "at least as great as the Eighth Amendment protections available to a convicted prisoner." *City of Revere v. Massachusetts Gen. Hosp.*, 463 U.S. 239, 244 (1983). Plaintiffs do not argue that Cole's *Fourteenth Amendment Due Process* rights are broader than a convicted felon's *Eighth Amendment* right to be free from cruel and unusual punishment. *See Hare v. City of Corinth*, 74 F.3d 633 (5th Cir. 1996) (noting that the Supreme Court has not resolved the issue and holding that deliberate indifference standard applies to a pretrial detainee's 42 U.S.C. § 1983 claim). Plaintiffs have forfeited that argument by arguing that the deliberate indifference inquiry established in *Farmer v. Brennan*, 114 S. Ct. 1970, governs this case.

1996). They must establish only that defendants were aware of a substantial risk of serious injury to Cole but nevertheless failed to take appropriate steps to protect him from a known danger.

Plaintiffs' theory is that the defendants knew that Cole was a suicide risk; they knew that plastic sanitary bags in the unit were accessible to Cole; they knew that the bags presented a serious risk of harm to Cole; and, they took no steps either to object to the availability of the plastic bags, to transfer Cole out of the psychiatric unit, or to increase the monitoring of him. Therefore, plaintiffs claim that defendants knowingly or recklessly disregarded a substantial risk of serious harm to Cole.

Plaintiffs cannot survive summary judgment in this case based upon allegations of medical malpractice. A prisoner (or, in this case, a pretrial detainee) cannot establish a § 1983 claim based upon inadequate medical care when the care provided is negligent. *Estelle v. Gamble*, 429 U.S. 97, 106 (1976); *Sellers v. Henman*, 41 F.3d 1100, 1102 (7th Cir. 1994). Plaintiffs must establish the medical officer's "deliberate indifference" to the patient's "serious medical needs." *Estelle*, 429 U.S. at 106; *see also Steele v. Choi*, 82 F.3d 175, 178 (7th Cir. 1996) (discussing difference between "negligent treatment" and "deliberate indifference"), *petition for cert. filed* (U.S. Aug. 1, 1996) (No. 96-5423); *Williams v. O'Leary*, 55 F.3d 320, 324 (7th Cir.), *cert. denied*, *Williams v. Brewer*, 116 S.Ct. 527 (1995).

Plaintiffs' claim that the district court erred in granting summary judgment rests upon the affidavit of their expert, Dr. Davis. Dr. Davis stated that the use of plastic bags in the BU2 unit created a substantial risk of serious harm to patients like Cole:

> The danger presented by the plastic bags in the trash can and the laundry hamper on the BU2 unit was obvious and significant, and constituted a substantial risk of serious harm, and significant risk of death, to a "potential suicide" patient such as Mr. Cole.

Davis concluded that the defendants did not adhere to a professional standard of medical care by failing to remove

Cole, failing to object to the presence of the bags, and by failing to monitor him more closely.

Plaintiffs focus on Dr. Davis's statement that the risk to Cole presented by the plastic bags was "obvious." Plaintiffs contend that this statement creates a genuine issue of material fact regarding whether the defendants were subjectively aware of the risk posed by the plastic bags. Plaintiffs rely on the Supreme Court's statement in *Farmer* that whether a defendant was "deliberately indifferent" is a question of fact that is "subject to demonstration in the usual ways, including inference from circumstantial evidence, and a factfinder may conclude that a prison official knew of a substantial risk from the very fact that the risk was obvious." *Farmer*, 114 S. Ct. at 1981 (citations omitted). Plaintiffs argue that Dr. Davis's testimony permits a reasonable factfinder to infer that the defendants "knew of a substantial risk" and were therefore deliberately indifferent. Plaintiffs concede that the inference is not conclusive (that is, a jury may reject the evidence), but they argue that it is sufficient to defeat a motion for summary judgment.

The district court judge rejected plaintiff's argument based on the fact that this type of harm had not occurred before in this Hospital.

> In this case, however, the evidence might be sufficient to allow a jury to find that the defendants should have recognized the risk, but it does not reasonably permit an inference that any of these defendants was *actually* aware of the risk. *Farmer* holds that "the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." [*Farmer*,]114 S. Ct. at 1979. This is not a case where the risk was "longstanding, pervasive, well-documented, or expressly noted by prison officials in the past, [nor in which] the circumstances suggest that the defendant-official being sued has been exposed to information concerning the risk and thus 'must have known' about it." [*Id.*] at 1981.

> . . . Where there is no evidence that anyone had recognized the risk before, Dr. Davis' opinion that the risk should have been obvious to the defendants would not allow a jury to infer reasonably that any of the defendants *actually* recognized the risk and chose to do nothing about it.

District Court Order, at p. 20-21.

Although we reach the same result as the district court, we clarify that proof that the defendant had the requisite knowledge of substantial risk through circumstantial evidence of the risk's obviousness does not require evidence of past injury caused by the same risk or evidence that a defendant had recognized the risk before. The Supreme Court addressed this argument in *Farmer* and stated that "a subjective approach to deliberate indifference does not require a prisoner seeking a remedy for unsafe conditions to await a tragic event such as an actual assault before obtaining relief." *Farmer*, 114 S. Ct. at 1983 (citations and internal quotations omitted). Plaintiff also need not prove that the defendant "has been exposed to information concerning the risk." Those facts will permit the jury to infer subjective awareness of a substantial risk of serious harm, but they are not required. "[A]ctual knowledge of a substantial risk of serious harm can be inferred by the trier of fact from the obviousness of the risk . . . ." *Haley*, 86 F.3d at 641.

With this in mind, we find that defendants did not create a genuine issue of material fact regarding whether defendants were subjectively aware that Cole would try to commit suicide. Suicide is a "serious harm" and defendants concede that plastic bags pose a substantial risk to a patient that is intent upon committing suicide. Acknowledging that plastic bags pose a substantial risk to a patient who intends to commit suicide, however, begs the question whether defendants were subjectively aware that *this plaintiff* intended to commit suicide.

In the instant case, Dr. Butler placed Cole on "potential" suicide precautions, the lower of two levels of suicide

precautions. Dr. Butler balanced the risks that a "potential" suicide patient faced and determined, in essence, that there was not a "substantial risk of serious harm" given the precautions attendant to a placement on "potential" suicide status. *Cf. States Bank of St. Charles v. Camic*, 712 F.2d 1140, 1146 (7th Cir.) ("deliberate indifference" standard is met only where there was a strong likelihood, rather than a mere possibility, that serious harm would occur), *cert. denied*, 464 U.S. 995 (1983). Cole was not monitored every second, but the staff undertook precautionary activities, including: conducting a contraband search at the beginning of each shift of each patient's room, locker and personal belongings; hourly assessment and observation; and, hourly "hall checks" to monitor the patient's movement.

Dr. Butler made a medical judgment that Cole did not need the suicide precautions attendant to "high risk suicide" classification. This diagnosis is, by definition, Butler's *subjective* conclusion regarding the risk Cole posed to himself. Dr. Butler determined that there was *some* risk that Cole would try to commit suicide with the bags[2] (thus the "potential suicide precautions") or any of the other myriad objects that were both available to Cole and capable of producing the desired result. Plaintiffs do not argue, and they put forth no evidence, that Dr. Butler misdiagnosed Cole. As the district court noted, plaintiffs assume that, because there was some risk of suicide, plaintiffs were obligated to take any available measures to protect Cole from himself. We cannot permit the factfinder to *infer* subjective knowledge of a substantial risk that Cole would harm himself based on Dr. Davis's testimony that the risk was "obvious" because this would conflict with Dr. Butler's subjective medical judgment, evidenced by her diagnosis, the appropriateness of which plaintiffs do not challenge.

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[2] We assume that Dr. Butler was aware of the existence of the bags and the danger that they posed to Cole. If she was not aware, then she could not be liable.

Even if we assume that plaintiffs challenge the appropriateness of Dr. Butler's medical judgment, we reach the same result and affirm the district court. Dr. Davis's affidavit states that the plastic bags posed an "obvious" risk to "potential suicide" patients. Normally, a jury may infer the subjective (awareness of a substantial risk) from the objective (obviousness of a risk). Cases of medical judgment are different. In *Estelle*, the Supreme Court recognized the distinction between a "medical judgment" and deliberate mistreatment.

> [T]he question whether an X-ray—or additional diagnostic techniques or forms of treatment—is indicated is a classic example of a matter for medical judgment. A medical decision not to order an X-ray, or like measures, does not represent cruel and unusual punishment. At most it is medical malpractice . . . .

Estelle, 429 U.S. at 107. Mere differences of opinion among medical personnel regarding a patient's appropriate treatment do not give rise to deliberate indifference. *Id.*; *White v. Napoleon*, 897 F.2d 103, 109-10 (3d Cir. 1990). Dr. Davis simply disagrees with Dr. Butler regarding the likelihood that Cole would attempt to commit suicide.

The question then becomes how "obvious" a risk must be, or how "erroneous" a medical professional's treatment decision must be, such that a jury may infer subjective awareness of the risk in a medical treatment case. The answer is that deliberate indifference may be inferred based upon a medical professional's erroneous treatment decision only when the medical professional's decision is such a substantial departure from accepted professional judgment, practice, or standards as to demonstrate that the person responsible did not base the decision on such a judgment.

The rule we recognize today is borrowed from the Supreme Court's decision in *Youngberg v. Romeo*, 457 U.S. 307, 322-23 (1982). *Youngberg* has particular relevance to today's case. In *Youngberg*, the Court held that a mentally retarded individual, who was involuntarily committed

to a state institution, had a substantive right to freedom from bodily restraint pursuant to the Fourteenth Amendment's Due Process Clause. *Id.* at 316. The Court noted that this right extends to convicted prisoners and to those patients who are involuntarily committed. *Id.* Cole, as a pretrial detainee, retained this right. Thus, Cole had a right to be free from bodily restraint.

This is one end of the spectrum of Cole's rights. At the other end of the spectrum is the right urged by plaintiffs today: Cole's right to safety—essentially a right *to be restrained* so that he would not injure himself. When faced with treatment of an individual in state custody, a medical professional must consider conflicting rights. Cole had a right to be free from restraint, but this right was not absolute; it ended at the point at which his freedom of restraint posed the substantial risk that he would seriously injure or kill himself. *Cf. id.* at 319-20 (noting that liberty interests in safety and freedom from bodily restraint "are not absolute; indeed to some extent they are in conflict"). At that point, Cole had a right to appropriate treatment, including bodily restraint. Where these conflicting rights intersect is a matter of medical judgment. In making this judgment, the medical professional must balance the need for treatment against competing concerns—i.e., preventing unnecessary treatment, the need for freedom from unnecessary restraint, etc. Surely, if defendants bound, gagged, and immobilized like Hannibal Lecter every patient for the sole purpose of preventing the patients from injuring themselves, then Cole would not have been able to access the plastic bags. At the same time, however, defendants would have violated Cole's right to be free from bodily restraint because the doctor would have failed to exercise medical judgment.

Youngberg and *Farmer* both require medical professionals to exercise medical judgment. The right to be free from bodily restraint is breached when an individual is restrained unless the decision was made "pursuant to an appropriate exercise of judgment by a health professional." *Wells v. Franzen*, 777 F.2d 1258, 1261 (7th Cir.

1985) (citing *Youngberg*, 457 U.S. at 321-23). If the decision is made by a professional, it is presumptively valid. *Youngberg*, 457 U.S. at 323. We find that the same standard applies to allegations of improper medical treatment as evidence of "deliberate indifference." "[L]iability may be imposed only when the decision by the professional is such a substantial departure from accepted professional judgment, practice, or standards as to demonstrate that the person responsible did not base the decision on such a judgment." *Id.* (footnotes omitted).

In a recent opinion, this court addressed the interplay between the deliberate indifference inquiry and a defendant's provision of medical treatment. In *Steele v. Choi*, 82 F.3d 175, we affirmed the district court's grant of summary judgment in favor of a doctor that had allegedly provided incompetent medical treatment to a state prisoner.

Plaintiff Steele, an Indiana prisoner, ultimately was diagnosed as having a subarachnoid hemorrhage (internal bleeding of the brain). Unfortunately, Steele was not diagnosed until after he had suffered considerably. Steele claimed that the defendant, Dr. Choi, misdiagnosed his condition for a period of approximately five days. Steele framed the issue as whether "his admitted symptoms were so obviously indicative of the subarachnoid hemorrhage that Dr. Choi must have known this was the problem, and thus Dr. Choi's failure to take any steps to order a medical workup for Steele to confirm the diagnosis amounted to deliberate indifference to a serious medical need." *Id.* at 178. We noted that Steele's argument on appeal "boils down to the proposition that a minimally competent doctor, looking at the symptoms Dr. Choi saw, would have known that subarachnoid hemorrhage was possible and would therefore have ordered the necessary tests to confirm the diagnosis." *Id.* at 179.

We rejected Steele's arguments because Steele's symptoms were consistent with conditions other than subarachnoid hemorrhage and the evidence indicated that Dr. Choi

did not know the actual cause of Steele's symptoms. *Id.* ("There is no evidence here tending to suggest that Steele's symptoms were consistent *only* with subarachnoid hemorrhage, and there is certainly no evidence that Dr. Choi was ignoring Steele's needs." (emphasis in original)). Steele's case might have been different if the symptoms clearly required a particular medical treatment but Dr. Choi had deliberately chosen not to provide it. *Id.* (citing as examples "the leg is broken, so it must be set; the person is not breathing, so CPR must be administered").

Steele's claim was remarkably similar to plaintiff's claim in the instant case: a minimally competent doctor in defendants' shoes would have been aware of a substantial risk. As in *Steele*, today we find that plaintiffs have not established a genuine issue whether defendants were deliberately indifferent. Plaintiffs do not argue that Dr. Butler's diagnosis of Cole as a "potential suicide" risk was such a substantial departure from accepted professional judgment, practice, or standards as to demonstrate that Dr. Butler did not base her diagnosis on such judgment. Thus, plaintiffs cannot establish that Dr. Butler was deliberately indifferent to Cole's serious medical needs.

III.

Although the foregoing discussion addresses Dr. Butler, we find that the district court's entry of summary judgment in favor of the defendant nurses was also appropriate. There is no evidence that the nurses had any input into Cole's risk classification. The risk classification is most appropriately made by a licensed psychiatrist, and there is no evidence that the nurses observed any behavior that required them to ask one of the Hospital's doctors to re-evaluate Cole or change Dr. Butler's "potential suicide precautions" classifications. In fact, it would have been inappropriate for any of the nurses to change Cole's classification for anything other than a temporary basis without consulting a physician.

IV.

Although we are sympathetic to plaintiffs' grief, we agree with the district court that there is no evidence in the record that establishes that defendants were deliberately indifferent to Cole's serious medical needs. We therefore AFFIRM the district court's entry of summary judgment in favor of defendants.

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

CAUSE NO. IP 93-1015-C-H/F

THE ESTATE OF MAX G. COLE, BY ITS ADMINISTRATRIX LOIS PARDUE AND LOIS PARDUE,	)
Plaintiff,	)
vs.	)
JACKIE FROMM, PHIL SPIRES, DAN BECK, KATIE GEIER EASTON, CLEMENT MORRIS, AND NANCY BUTLER, ALL INDIVIDUALLY,	)
Defendant.	)

ENTRY ON DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT

The estate of Max G. Cole and Mr. Cole's mother brought this action against a doctor and several other staff at Wishard Memorial Hospital in Indianapolis. Cole was a pretrial detainee in the Marion County Jail who was transferred to Wishard. He was classified as a "potential suicide," but not a "high risk suicide" patient. He managed to obtain a plastic bag and committed suicide by suffocation. The plaintiffs assert that the defendants acted under color of

state law and were deliberately indifferent to the risk that Cole would commit suicide.

Currently pending before the court are two motions for summary judgment. One was filed by defendants Jackie Fromm, Phill Spires, Dan Beck, Katie Geier Easton, and Clement Morris collectively. The other was filed by the remaining defendant, Dr. Nancy Butler.[1] The case raises a number of potential issues, but defendants seek summary judgment only on the grounds that there is no evidence that they were deliberately indifferent to Cole's medical needs and that they are entitled to qualified immunity. Plaintiffs have responded to both motions. (Defendants have also filed a motion to strike the affidavit of plaintiffs' expert, Dr. Larry M. Davis. Defendants' motion to strike will be denied in most respects.) The facts, taken in the light most favorable to plaintiffs, would not allow a jury to find that any defendant was deliberately indifferent to Cole's medical needs, including the risk that he would commit suicide by

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[1]Plaintiffs' original complaint named twelve other health care providers working at Wishard. Six of these defendants, Jay Sutherland, Onvie Turner, Jeff Brackin, Glen Thompson, Joy Bennet Conway and S. Mahajam, were dismissed from the lawsuit by stipulation on December 7, 1993, and final judgment was entered with respect to them on December 20, 1993. The other six defendants, Bruce Miller, Stacy Evans, Larry Mitchell, Rita Montgomery, Monica Owens, and Allan Bryant, were dismissed by stipulation on January 14, 1994, and final judgment was entered with respect to them on February 10, 1994.

any means, including the plastic bag. The court will therefore grant summary judgment for all defendants and enter final judgment against plaintiffs.

Undisputed Facts

The following facts are either undisputed or reflect the evidence in the light most favorable to plaintiffs. On July 1, 1991, Max Cole was a pretrial detainee being held at the Marion County Jail in Indianapolis, Indiana. On that day he was transferred from the jail to Wishard Memorial Hospital, reportedly because he had been hitting his head against a concrete wall at the jail and had been in a fight with another inmate. Cole was treated initially for abrasions to his face and forehead, and Dr. Alan Schmetzer, Chief of Psychiatry Services for Wishard, then assessed Cole's mental health status. Dr. Schmetzer noted that Cole denied any suicidal ideation and determined that neither his injuries nor his mental health status required admission to the hospital. Dr. Schmetzer thus recommended that Cole be returned to the jail with a follow-up examination to be conducted on July 3, 1991. After his examination of Cole, Dr. Schmetzer's shift ended and he left the hospital.

After Dr. Schmetzer's examination, but before Cole could be returned to jail, he became agitated, out of control, and tried to leave the emergency room. Cole was placed in restraints and Dr. Verkota Rao, a physician specializing in psychiatry, reevaluated him. Dr. Rao determined that Cole was experiencing symptoms of a drug-induced psychosis and he ordered Cole admitted to the hospital in the unit called "BU2." Dr. Rao placed Cole on potential assault, suicide,

and elopement precautions at the time of his admission. He also prescribed Navane, an anti-psychotic drug, for Cole.

There are two levels of precautions under Wishard's policies relating to patients with possible suicidal tendencies. One level is known as "potential suicide precautions." The other possible level is known as "high risk suicide precautions." A doctor's order is required either to institute or to discontinue precautions at either level. The stated purpose of the "potential suicide" precautions level is to "provide ongoing assessment and intervention of patients who exhibit or verbalize suicidal ideations." Butler Dep., P1. Ex. 11. Although the policy requires "close observation" by the caregiver, regular but not constant monitoring of the patient's behavior is appropriate. *Id.* Under the policy, the areas to which the patient has access are searched for contraband initially and thereafter "as needed." *Id.* Patients on potential suicide precautions may generally move freely about the BU2 unit and have access to the restrooms.

The purpose of the "high risk" precautions level is to "provide a safe and therapeutic environment for those patients who exhibit or verbalize serious suicidal intention." Butler Dep., Pl. Ex. 12. Under the high risk classification, there is continuous one-to-one monitoring of the patient. *Id.* Upon initiation of the precautions and during every shift thereafter, the patient's room, locker, and personal belongings are carefully searched for contraband. *Id.*

Defendant Dr. Nancy Butler is a board certified psychiatrist and Medical Director of In-Patient Psychiatry at Wishard. On July 2, the day following Cole's admission,

Dr. Butler reviewed Cole's chart and conducted an independent mental status examination. She found that Cole was not contemplating suicide at that time and did not need a change in the "potential suicide" precautions assigned by Dr. Rao. In examining Cole, Dr. Butler found that he said he heard voices that told him, among other things, to hurt himself and others. Based on that statement and his agitation, Dr. Butler felt it proper to keep Cole on precautions. However, she did not believe that Cole was a high risk suicide patient at that time because he spoke logically and coherently, his hallucinations seemed mostly directed toward hurting others, and he disavowed a desire or need to act on his hallucinogenic suggestions. Moreover, Dr. Butler concurred with Dr. Schmetzer that Cole's behavior was likely caused by drug-induced psychosis as opposed to a personality disorder. She continued the Navane prescription and also prescribed Cogentin to combat the side effects of Navane.

The next day, July 3, 1991, Dr. Butler observed Cole and reviewed his chart. He had continued fluctuations in his behavior that Dr. Butler deemed consistent with a drug-induced psychosis. Dr. Butler's opinion at the time was that Cole did not need a change in his precautions because he did not exhibit signs suggesting he was contemplating suicide. Dr. Butler did not observe Cole after July 3.

On July 4, 1991, Dr. Schmetzer observed Cole. Late in the afternoon on July 4, the side effects from the medication began to subside. At 6:00 p.m., Cole was observed to be in his assigned room, asleep, and with no further signs of distress noted. Similar observations were made at 7:00 p.m., 8:00 p.m., and 9:00 p.m. At 9:45, Cole was observed

to be alert with no complaints of medication side effects. At 9:55 p.m., Cole came to the dayroom in the unit and requested a cigarette from defendant Fromm, the nurse on duty. Fromm gave Cole a cigarette and recalls that he told her that he felt better. Cole did not appear to Fromm to be agitated or depressed, and he made no mention at that time of harming himself.

About 25 minutes later, at approximately 10:22 p.m. on July 4, Cole was found to have committed suicide in his room. Tana Wurster, another nurse on duty, found Cole with a plastic bag over his head. She removed the bag, called to him and tried to shake him, but was unable to revive him. She called for help and ordered defendants Spires and Morris to carry Cole to the men's restroom so that he could be placed in the shower. Wurster testified that she thought Cole might he holding his breath because she had spoken to him not long before she found him. Fromm heard the commotion in Cole's room from the attempt to get him to the shower and investigated. When Fromm arrived, she instructed Spires and Morris to put Cole down, checked for a pulse, determined that he was not breathing, and initiated CPR. Defendant Easton, also on the scene by that time, returned to the nurses station and called for the "code team," or emergency help. The code team arrived and took over CPR efforts. From that point no member of the BU2 staff had any further involvement with Cole's care. Cole was pronounced dead at approximately 11:00 p.m.

The defendants all had varying degrees of contact with Cole. Jackie Fromm is a licensed practical nurse who had worked at Wishard in that capacity for approximately five years prior to Cole's admission. During the four days of

Cole's hospitalization, Nurse Fromm was never assigned to his care. However, she interacted with Cole in the course of her regular nursing duties. She testified that in the course of that interaction, she never observed any behavior that would suggest to her that there was need for a change in Cole's precautions. She documented his denial of suicidal tendencies on her nursing observation chart.

Katie Geier Easton was a graduate nurse at the time of Cole's hospitalization, which means she had just completed her bachelor's degree in nursing but had not yet taken her Registered Nursing licensure examination. She had been employed at Wishard for six weeks prior to Cole's death. Easton was never responsible for Cole's health care. Her only contact with Cole was during the course of hall checks she made for all patients. During those hall checks, Easton observed Cole once on July 2, once on July 3, and four times on July 4. She did not observe on any of these occasions any behavior that suggested to her that Cole intended to harm himself.

Daniel Beck was a Nursing Mental Health Clinician at the time of Cole's hospitalization. Beck did not work in the BU2 unit from July 1 through July 3, but he did work in the unit on the evening shift of July 4. Beck was not assigned to Cole's care but performed two hall checks where he observed Cole. He did not observe on those two occasions any behavior that suggested Cole had suicidal tendencies.

Clement Morris was also a Nursing Mental Health Clinician at the time of Cole's hospitalization. He worked evening shifts in the unit on July 1, 3, and 4. Morris was never assigned to Cole's care, but he observed Cole on

several occasions during his shifts. He never observed any behavior from Cole that suggested he had suicidal tendencies.

Phill Spires was also a Nursing Mental Health Clinician at the time of Cole's hospitalization. Spires worked the day shifts on July 2 and July 4 but had no involvement with Cole's care during those shifts. Spires was assigned to Cole's care during the evening shift of July 4. The assignment meant that Cole could go to Spires in the event he needed food, clothing, or someone to talk to. Spires also never observed behavior that suggested to him that Cole had suicidal tendencies.

Defendants have identified the plastic bag Cole used to commit suicide as being similar to those used as liners for the soiled linen hampers in the two restrooms in the BU2 unit. (There is a third hamper with a plastic liner in the utility room, but that room is kept locked and inaccessible to patients.) The plastic liners are used pursuant to a Wishard policy that is designed to comply with Indiana State Board of Health regulations governing communicable disease control policies.

None of the nursing defendants (Fromm, Spires, Beck, Easton, and Morris) had any input into the creation or development of Wishard's infectious disease control policy. Similarly, none of the nursing defendants had input into the creation or development of Wishard's suicide risk classification policy. Dr. Butler approved the suicide risk classification policy for implementation. The nursing defendants knew that plastic bags were used in the restrooms of the BU2 unit. Dr. Butler testified she did not have such

knowledge, but, as plaintiffs point out, a jury could reasonably find that she did know the bags were there. There is no direct evidence that any defendant perceived the bags to be a danger to patients. No one had ever suggested to any of the nursing defendants that the plastic sanitary liners posed a danger to Cole or any other patient. In fact, there is no evidence that any person who had ever worked in the BU2 unit, visited it, or inspected it had ever recognized that the bags posed a risk to patients, let alone that any such person called that risk to the attention of anyone else. Before Cole's suicide, no BU2 unit patient, in any of the defendants' memories, had ever tried to use a plastic bag to harm himself or herself. None of the defendants witnessed Cole obtaining the plastic bag or knew that he intended to obtain it.

Defendants' Motion to Strike

Defendants object to the affidavit of Dr. Larry M. Davis, plaintiffs' expert. In his affidavit, Dr. Davis, a board certified psychiatrist, provides opinions on the danger of plastic bags, the general knowledge of that danger to mental health workers, and the duty of mental health workers, such as defendants here, to object to plastic bags being accessible to patients like Cole, or to remove them from the unit. Defendants object to Dr. Davis' affidavit on several different grounds.

First, defendants say that the entire affidavit is inadmissible because it is not based on the affiant's personal knowledge as required by Fed. R. Civ. P. 56(e). Dr. Davis' affidavit does not use the words "personal knowledge." However, Dr. Davis is an expert witness, not a fact witness.

Under the Federal Rules of Evidence, an expert witness is not required to have personal knowledge of the underlying facts in the lawsuit. An expert may testify to his or her specialized knowledge that will assist the trier of fact. See Fed. R. Evid. 702, 703. In making his affidavit, Dr. Davis did what was required of an expert: he affirmed the truth of his statements, he stated his qualifications, he stated that he had reviewed certain materials to render an expert opinion, and he stated his opinion. Defendants' objection to the affidavit as a whole is overruled.

Next, defendants object to what they say are Dr. Davis' impermissible attributions of subjective knowledge to them. Specifically, in his affidavit, Dr. Davis, discussing the danger posed by the plastic bags, stated:

> The danger presented by the plastic bags in the trash can and the laundry hamper on the BU2 unit were [sic] obvious and significant, and constituted a substantial risk of serious harm, and significant risk of death, to a "potential suicide" patient such as Mr. Cole. *This danger was obvious to Dr. Butler, Ms. Fromm, Mr, Spires, Ms. Easton, Mr. Beck, and Mr. Morris.*

Davis Affidavit, ¶ 4 (emphasis added).

The first sentence of Paragraph 4 is admissible because it is a statement relevant to the medical standard of care Dr. Davis asserts was applicable to and breached by the defendants. His reference to the danger being "obvious" in this sentence seems to be an assertion of what *should* have

been noticed. There are similar statements elsewhere in the affidavit. However, the second sentence of Paragraph 4 seems to go a step farther and to instruct the trier of fact what was subjectively "obvious" to these defendants. As will be seen below, the difference between what should have been obvious to the defendants (at least according to Dr. Davis) and what was in fact known to them is a decisive difference. Dr. Davis has no personal knowledge concerning, and may not render an opinion on, the subjective knowledge of the defendants, so the second sentence of Paragraph 4 will be stricken.

Finally, defendants assert that Dr. Davis' affidavit contains inadmissible legal conclusions. Defendants attack Dr. Davis' statements concerning defendants' duties mentioned above. Specifically, defendants object to Dr. Davis' assertion in Paragraph 8 of the affidavit that they had "a duty to either object to the availability of plastic bags on the unit and demand their removal or to increase their monitoring level of Cole." Citing cases discussing the often hazardous exercise of distinguishing between permissible expert opinion on the ultimate factual issue and impermissible legal conclusions, defendants say that Dr. Davis' statement in Paragraph 8 is "unfounded." A review of the affidavit, however, shows that he "founded" his conclusion on the following facts: (1) the consensus among psychiatrists and mental health care workers is that plastic bags are dangerous, see ¶ 1; (2) there have been campaigns in the past to educate the public about the dangers of plastic bags, see ¶ 2; (3) warning labels now appear on plastic bags as a result of those campaigns, see ¶ 2; (4) plastic bags presented a threat to Cole as a patient on potential suicide status, see ¶ 3; and (5) physicians, nurses, and mental health

care workers have a duty to inspect the unit for dangerous items, see ¶¶ 5, 6. Paragraph 8 does not contain statements on the "ultimate fact" of a violation of the *constitutional* standard at issue here. It contains statements that together comprise Dr. Davis' opinion on the appropriate medical standard of care defendants owed to Cole. While Dr. Davis' opinions on that standard and on the defendants' purported breach are not dispositive, as discussed below, they are relevant to the extent they may be used as circumstantial evidence of what defendants knew of the risks Cole faced. See *Farmer v. Brennan,* 114 S. Ct. 1970, 1981-82 (1994). Defendants' motion to strike is therefore overruled except as to the second sentence of Paragraph 4.[2]

Motion for Summary Judgment

The facts in this case are not disputed. At issue are the permissible inferences which may reasonably be drawn from those undisputed facts and how those inferences measure up against the standard of liability for these defendants. Plaintiffs' sole claim is that defendants are liable under 42

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[2]Defendants did not object specifically to paragraph 9 of Dr. Davis' affidavit, which purports to inform the court that there is no evidence that the defendants objected to Cole's classification, that there is no evidence that defendants demanded Cole's removal or transfer from the unit, and that there is no evidence that defendants objected to the availability of plastic bags in the unit. This seems to be more argument than evidence, but the court will treat it as an explanation of Dr. Davis' opinion and therefore will not strike Paragraph 9.

U.S.C. § 1983 for violating Max Cole's due process rights under the Fourteenth Amendment by being deliberately indifferent to the risk that he would commit suicide while in their care. Plaintiffs' theory is that the defendants knew Cole was a suicide risk; they knew plastic bags in the unit were accessible to Cole; they knew the bags presented a serious risk of harm to Cole; and they took no steps either to object to the availability of the plastic bags, to transfer Cole out of the BU2 unit, or to increase their monitoring of him. Thus, say plaintiffs, a jury may infer that the defendants knowingly or recklessly disregarded a substantial risk of serious harm to Cole.

The first question is the relevant standard of liability for defendants here. Convicted prisoners are protected by the Eighth Amendment's prohibition on "cruel and unusual punishment," which protects prisoners from "deliberate indifference" to their serious medical needs. *E. g., Farmer v. Brennan,* 114 S. Ct. 1970, 1979-80 (1994); *Estelle v. Gamble,* 429 U. S. 97, 105 (1976). *Farmer* made it clear that the "deliberate indifference" standard under the Eighth Amendment must focus on the defendant's subjective state of mind, not on an objective standard of what the defendant should have known. The Court said that (1) there is no liability "unless the official knows of and disregards an excessive risk to inmate health or safety"; (2) "the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference"; and (3) "[a]n official's failure to alleviate a significant risk that he should have perceived but did not, while no cause for commendation, cannot under our cases be condemned as the infliction of punishment." 114 S. Ct. at 1979.

Farmer further explained the deliberate indifference standard by noting the distinction between being "reckless" in the criminal as opposed to the civil sense. In civil cases, recklessness usually may be found if a person under a legal duty acts or fails to act "in the face of an unjustifiably high risk of harm that is either known or so obvious that it should be known." 114 S. Ct. at 1978. "The criminal law, however, generally permits a finding of recklessness only when a person disregards a risk of harm of which he is aware." *Id.* at 1978-79. This critical difference should not be exaggerated, however, for similar evidence may be considered to establish either level of recklessness. In *Farmer* the Supreme Court explained that "[whether a prison official had the requisite knowledge of a substantial risk is a question of fact subject to demonstration in the usual ways, including inference from circumstantial evidence, and a factfinder may conclude that a prison official knew of a substantial risk from the very fact that the risk was obvious." 114 S. Ct. at 1981 (citations omitted). The Court emphasized, however, that a plaintiff may not prove deliberate indifference by proving that a reasonable person would have known of the risk or that the defendant should have known of the risk. 114 S. Ct. at 1982 n. 8.

Farmer does not apply directly here because the Eighth Amendment does not apply to "pretrial detainees," those persons under detention who have not been convicted and incarcerated; pretrial detainees are not subject to punishment that the Eighth Amendment regulates. *Hall v. Ryan,* 957 F.2d 402, 405 (7th Cir. 1992). For those detained by a state, the protection afforded pretrial detainees from harm by government officials is found in the due process clause of the Fourteenth Amendment. *Anderson v. Gutschenritter,* 836

F.2d 346, 348 (7th Cir. 1988) (citing *Ingraham v. Wright*, 430 U.S. 651, 671-72 n.40 (1977)). The Supreme Court has not definitively articulated the standard of § 1983 liability for government officials being sued by pretrial detainees under the due process clause. However, the Court has made clear that it is higher than simple negligence. See *Davidson v. Cannon*, 474 U.S. 344, 348 *(1986); Daniels v. Williams*, 474 U.S. 327, 333-34 (1986).

The Seventh Circuit has held that the due process clause standard for § 1983 liability for claims brought by pretrial detainees is "wilful neglect." *Hall v. Ryan*, 957 F.2d at 405. The court said it equated that standard with deliberate indifference, and that it was the appropriate standard in cases where the pretrial detainee was a suicide risk. *Id.* The Seventh Circuit has also said that "recklessness" may describe the standard under the due process clause as long as it is clear that it is a *subjective* knowledge that must be inferred from the risk posed. *Archie v. City of Racine*, 847 F. 2d 1211, 1219 (7th Cir. 1988) *(en banc)*. That holding is consistent with the *Farmer* concept of "deliberate indifference" for claims by prisoners under the Eighth Amendment. *Farmer*, 114 S. Ct. at 1979-80. The Seventh Circuit has made clear that an official's "gross negligence" does not render him liable under the due process clause. *Archie*, 847 F.2d at 1219. Compare *Farmer*, 114 S. Ct. at 1978 n.4 ("gross negligence" is a nebulous term typically meaning something little different than civil law recklessness), with *Daniels v. Williams*, 474 U.S. at 334 n.3 (expressly declining to decide whether something less than intentional conduct, e.g., "gross negligence," is enough to trigger protections of due process clause where allegations there amounted to claim of simple negligence). The Seventh

Circuit's standard of "wilful neglect, " which requires a finding of subjective knowledge of the risk, appears to be identical to the *Farmer* standard of deliberate indifference. That standard governs this case.

In attempting to meet the deliberate indifference standard here, plaintiffs focus on the defendants' failure to prevent Cole from obtaining the plastic bag that he used to commit suicide. The court believes the analysis must begin at a somewhat broader level. The first question is the propriety of the evaluation of Cole by Dr. Butler (consistent with the evaluations of Dr. Schmetzer and Dr. Rao) placing him under the lower of the two levels of suicide precautions. Second, if Cole was reasonably classified at the lower level of suicide risk, the question is whether any of the defendants was deliberately indifferent to the risk that he would commit suicide.[3]

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[3]The cases in this area suggest that the risk must be a "serious" one before the duty on which the deliberate indifference standard is based arises. See generally *Estelle v. Gamble,* 429 U.S. at 105-06; accord, *State Bank of St. Charles v. Camic,* 712 F.2d 1140, 1146 (7th Cir. 1983) (there must be "strong likelihood" as opposed to "mere possibility" that inmate will attempt suicide in particular case to render official liable under deliberate indifference standard); *Viero v. Bufano,* __ F. Supp. __, __, 1995 WL 613725, *2-3 (N.D. Ill. 1995) (same). Whatever the precise content of a "serious risk," there is every indication here that all the defendants were working under the assumption that there was some risk Mr. Cole could try to commit suicide.

Plaintiffs have not pointed to any information that was available to Dr. Butler that should have convinced her to classify Cole as a "high risk" patient. Plaintiffs put forth no evidence that Dr. Butler misdiagnosed Cole's condition initially or that his later behavior ever warranted an upgrading of his precautions. Thus, it would be doubtful on this record whether plaintiffs could even avoid summary judgment under a negligence standard on this issue, let alone show that Dr. Butler was deliberately indifferent to Cole's proper classification.[4] There is also no evidence that the nursing defendants had any input into the risk classification (that required a doctor's order), or that any of them ever observed any behavior or circumstances that should have led

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[4]*See Brownlow v. Chavez,* 871 F. Supp. 1061, 1063 (S.D. Ind. 1994) (neither "[medical malpractice [nor] inadvertent failure to provide adequate medical care . . . amount[s] to a constitutional violation"); *Bell v. Stigers,* 937 F.2d 1340, 1343-44 (8th Cir. 1991) (discussing several prison suicide cases involving question of the knowledge of the risk required for liability). On the other hand, defendants have provided significant evidence that they took reasonable precautions to protect Cole. See *State Bank of St. Charles v. Camic,* 712 F. 2d 1140, 1146 (7th Cir. 1983) (lack of knowledge of extent of suicidal tendencies combined with reasonable precautions preclude finding of deliberate indifference). See also *Tittle v. Mahan,* 566 N.E.2d 1064, 1071 (Ind. App. 1991) (deputy sheriff's observation of pretrial detainee on suicide precautions 42 times in 48 hours was not enough to protect inmate, but failure was negligent, not result of deliberate indifference), *vacated in part on other grounds,* 582 N. E. 2d 796, 802 (Ind. 1991).

them to ask a doctor to re-evaluate Cole for the "high risk" level of precautions.

Thus, neither Dr. Butler nor any other defendant can be held liable for Cole's classification at the lower of the two levels of suicide precaution. This conclusion is important because plaintiffs' arguments seem to proceed from the premise that, because Cole presented some risk of suicide, defendants were obligated to take any available measures to prevent his suicide. It is true that Cole probably would not have been able to commit suicide at Wishard if he had been classified as "high risk" and subjected to continuous one-on-one monitoring. However, the Constitution does not require those who care for prisoners or pretrial detainees to guarantee the safety of their charges even against known risks. In this case physicians reasonably classified Cole as a "potential suicide" and took steps that were intended to prevent his suicide.

The fact that more stringent measures probably would have been successful in protecting Cole from suicide does not mean that any defendant was deliberately indifferent to his needs. The measures actually taken to protect him were significant. They included searches and frequent observation and evaluation. More intrusive, more restrictive, and more expensive measures could have been taken. But there is no evidence that the classification of Cole at the lower level of risk was even unreasonable, let alone an act of deliberate indifference.

In addition, courts need to be careful before they impose liability on government officials for not imposing more stringent restrictions on a prisoner or pretrial detainee.

Prison officials and health care workers treating patients who are under detention are also under constitutional pressure not to take too much liberty away from their charges. The Eighth Amendment would intervene if prisoners were automatically strait-jacketed at the slightest hint of odd behavior. As Chief Judge Posner has written for the Seventh Circuit, "Liability is a pretty blunt instrument for shaping behavior, so when there is liability for doing too little of a thing, the law should hesitate before imposing liability for doing too much of it." *Charter Oak Fire Ins. Co. v. Color Converting Industries, Co.*, 45 F. 3d 1170, 1175 (7th Cir. 1995) (citing *DeShaney v. Winnebago County Dept. of Social Services*, 489 U. S. 189, 203 (1989) and *United Steelworkers of America v. Weber*, 443 U.S. 193, 210 (1979)). The situation here is the mirror image. Where officials risk some liability by restraining pretrial detainees too severely, they must be allowed some latitude to impose less severe restraints. They are entitled to make professional judgments about the extent of the risk in a particular case. And that latitude must include the latitude to make judgments that turn out, with the benefit of hindsight, to have been incorrect. Moreover, the evidence in this case shows that the mental health department at Wishard has had 800 to 1000 patients per year with varying conditions that may make them risks to themselves or to others. Where both personal liberty is at stake and scarce resources must be allocated, liability rules (including those developed under the Constitution) cannot be imposed so as to require essentially every patient who presents with any degree of risk of suicide to be classified as though he or she were a high risk, just to be on the safe side.

These points do not completely decide this case, however. The analysis now turns to the role of the plastic bags in Cole's death. Plaintiffs have argued that the nursing defendants should have objected to the use of the plastic bags in the BU2 unit restrooms, should have attempted to upgrade his precautionary status, or should have monitored him more closely. The evidence shows that the nursing defendants knew that the plastic bags were used as hamper liners in the restrooms. Dr. Butler testified that she did not know about the plastic hamper liners, though plaintiffs suggest a jury could find otherwise. The court agrees that a jury could reasonably decide not to believe Dr. Butler on this point. Thus, at least for purposes of the motions for summary judgment, the defendants were aware of at least one fact that is indispensable to plaintiffs' claim.

Under the deliberate indifference standard, however, none of the defendants can be liable unless a plaintiff can show that an individual defendant was aware of facts from which the inference of a serious risk of harm was possible and that the defendant actually made the inference. *Farmer*, 114 S. Ct. at 1979. Direct evidence of a defendant's thought process in this context is likely to be rare, and the *Farmer* Court held that circumstantial evidence may be used to demonstrate the defendant's knowledge. See 114 S. Ct. at 1981 ("a factfinder may conclude that a prison official knew of a substantial risk from the very fact that the risk was obvious"). If the plaintiff offers evidence sufficient to show that a risk was so obvious that it would allow a jury to find that the defendant official actually knew of the risk of harm when he or she acted to cause (or failed to act to prevent) the harm, then the jury may find that the defendant actually

made the inference that such harm was likely to accrue, and therefore that the defendant was deliberately indifferent.

The evidence relevant to the defendants' knowledge of the risk of harm to Cole consists of (1) the evidence that all the nursing defendants knew of the existence of the plastic bags (and that Dr. Butler arguably knew of them), and (2) the opinions of plaintiff's expert, Dr. Davis, (a) that the use of the plastic bags in the BU2 unit created a serious risk of substantial harm to patients like Cole, and (b) that the defendants did not adhere to a professional standard of medical care by failing to remove Cole, object to the presence of the bags, or monitor him more closely. In short, Dr. Davis opines that the danger was obvious, and thus should have been obvious to the defendants. Plaintiffs argue that *Farmer* would allow a jury in this case to infer reasonably that the risk posed by the plastic bags in the restroom laundry hampers was so obvious that the defendants *must* have known about it and then chose to do nothing about it. *Farmer* clearly allows a plaintiff to prove knowledge from circumstantial evidence that the risk was obvious. 114 S. Ct. at 1981.

In this case, however, the evidence might be sufficient to allow a jury to find that the defendants should have recognized the risk, but it does not reasonably permit an inference that any of these defendants was *actually,* aware of the risk. *Farmer* holds that "the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." 114 S. Ct. at 1979. This is not a case where the risk was "longstanding, pervasive, well-documented, or expressly noted by prison officials in the

past, [nor in which] the circumstances suggest that the defendant-official being sued had been exposed to information concerning the risk and thus 'must have known' about it. . . . *Farmer,* 114 S. Ct. at 1981. To the contrary, the undisputed evidence here shows (a) that no patient had previously tried to commit suicide by using a plastic bag, (b) that no staff member of Wishard had ever recognized the risk posed by the bags, let alone told anyone else about the risk, (c) that no visitor, inspector, or anyone else had recognized the risk before Cole committed suicide, and (d) that no defendant had been advised of the risk by anyone else. Where there is no evidence that anyone had recognized the risk before, Dr. Davis' opinion that the risk should have been obvious to the defendants would not allow a jury to infer reasonably that any of these defendants actually recognized the risk and chose to do nothing about it.

Conclusion

Plaintiffs put forth no evidence that, based on the information known to defendants at the time, defendants misdiagnosed Cole's condition or that his earlier behavior warranted an upgrading of his precautions, let alone that any defendant knew of and was indifferent to this alleged misdiagnosis. Further, there is no evidence from which a jury could reasonably find that any defendant was actually aware of the serious risk of harm to Cole posed by the plastic hamper liners and then deliberately failed to act. Taking the evidence in the light most favorable to plaintiffs, there is no showing of deliberate indifference. The motions for summary judgment are therefore GRANTED. The court will enter final judgment in favor of defendants.

Date: November 27, 1995

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Supreme Court, U.S.
FILED
DEC 20 1996
CLERK

No. 96-782

In The

Supreme Court of the United States

October Term, 1996

THE ESTATE OF MAX G. COLE, by its Administratrix Lois Pardue, AND LOIS PARDUE,

Petitioners,

v.

NANCY BUTLER, individually,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

December 20, 1996

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STATEMENT OF THE CASE

1. FACTS. On July 1, 1991, Max Cole was brought from the Marion County lock-up to Wishard and was seen by Wishard Crisis Intervention Unit personnel at the hospital's emergency room. Reportedly, Mr. Cole had been hitting his head against a wall at the jail and had been in a fight with another inmate. (R. 54, Exh. 3. ¶ 14.) Mr. Cole was assessed by Dr. Alan Schmetzer, who recommended that the patient be returned to jail. (R. 54, Exh. 3, ¶¶ 14-15.)

Mr. Cole became agitated and tried to leave the emergency room. Dr. Verkota Rao reevaluated Mr. Cole and determined he was experiencing symptoms of a drug-induced psychosis and admitted Mr. Cole to BU2. Dr. Rao placed Mr. Cole on potential assault, suicide and elopement precaution. (R. 63, p. 75.)

At the time of Mr. Cole's admission to Wishard, Dr. Nancy Butler was the Medical Director of Inpatient Psychiatry and Staff Psychiatrist with Midtown Mental Health Center, a division of Wishard Hospital. (R. 63, p. 5.) Dr. Butler has been a Board certified psychiatrist since 1986. (R. 63, Defts. Exh. "A".)

Dr. Butler first saw Mr. Cole on July 2, 1991. After reviewing his chart and conducting a mental status examination of the patient, it was her opinion that Mr. Cole was not currently contemplating suicide and was not in need of any change in precautions assigned by Dr. Rao. (R. 63, pp. 80-82.) Dr. Butler did not believe that Mr. Cole was a "high risk" patient, even though Mr. Cole reported that he heard voices telling him to commit suicide,

because Mr. Cole did not express a present intent to commit suicide. (R. 63, pp. 36-38.)

Dr. Butler again saw Mr. Cole on July 3, 1991. His behavior was deemed to be consistent with a patient suffering from drug-induced psychosis. It was Dr. Butler's opinion that there was no need for a change in Mr. Cole's precautions on July 3, 1991. Mr. Cole spoke logically and was coherent, but did suffer from paranoid ideations and auditory hallucinations. (R. 63, p. 36.)

Dr. Butler did not personally see Mr. Cole after July 3, 1991. Mr. Cole was seen by Dr. Schmetzer on July 4, 1991, who maintained the precautions previously assigned. Mr. Cole was discovered to have committed suicide on July 4, 1991 at approximately 11:00 p.m. by suffocating himself with the liner from the linen hamper. (R. 58, pp. 32-34.) The linen hampers were lined with plastic sanitary bags to comply with Wishard's infectious disease control policy, which was developed to comply with regulations promulgated by the Indiana State Board of Health. (R. 54, Exh. 3, ¶¶ 4, 5.)

Dr. Butler had no knowledge that there were plastic bags in the linen hampers at Wishard Hospital. (R. 63, p. 88.) No patient had, to her knowledge, ever attempted to harm himself using a plastic bag from the Unit. (R. 63, p. 88.)

2. CASE HISTORY. Plaintiffs brought suit against Dr. Butler and several nurses under 42 U.S.C. § 1983, for knowingly disregarding a substantial risk of death to Mr. Cole. The Defendants moved for summary judgment, which was granted on November 27, 1995. The Seventh

Circuit Court affirmed. Plaintiffs are seeking a *writ of certiorari* solely to pursue their claims against Dr. Butler.

REASONS FOR DENYING THE WRIT

1. The Seventh Circuit's ruling does not totally prohibit prisoners and pre-trial detainees from presenting expert testimony to challenge a prison doctor's denial of deliberate indifference.

This Court's decision in *Farmer v. Brennan*, 511 U.S. 825, 114 S.Ct. 1970 (1994) specifically rejected an objective test for "deliberate indifference" and held that liability will be established only if

> "the official knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the indifference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference."

Id. at 1979.

Nothing in the Seventh Circuit's opinion in this case, nor this Court's opinion in *Farmer*, prohibits the use of expert testimony to create a material issue of fact regarding deliberate indifference on the part of prison doctors. In fact, this Court in *Farmer* explained that

> "whether a prison official had the requisite knowledge of a substantial risk is a question of fact subject to demonstration in the usual way, including inference from circumstantial evidence, and a factfinder may conclude that a

> prison official knew of a substantial risk from the very fact that the risk was obvious."

114 S.Ct. at 1981. *(Citations omitted.)*

Dr. Butler made a medical judgment and placed Mr. Cole on the lower of the two levels of suicide precautions. Therefore, by her diagnosis, Dr. Butler made the *subjective* determination that there was not a "substantial risk of serious harm" to Mr. Cole. Such decision has not been challenged by the Plaintiffs.

The Plaintiffs presented evidence by Affidavit of Dr. Larry Davis that the use of plastic bags in the Unit created a substantial risk of serious harm to "potential suicide" patients such as Mr. Cole, and that such a risk was "obvious".

The Plaintiffs have mischaracterized the Seventh Circuit's holding in this case as having created an exception in cases involving prison doctors to the rule set forth in *Farmer*. The Seventh Circuit correctly applied the law as set forth in *Farmer* and held that since the Plaintiffs had not challenged the "appropriateness" of Mr. Cole's diagnosis, Dr. Davis's testimony regarding the "obviousness" of the risk was in conflict with Dr. Butler's subjective medical judgment. Therefore, the Plaintiffs could not establish that Dr. Butler was deliberately indifferent to Mr. Cole's serious medical needs.

The Seventh Circuit did not hold that in all cases involving a prison doctor's denial of deliberate indifference, expert evidence would not be allowed to permit the inference of subjective knowledge from the objective fact that the risk was obvious. However, as the law was

correctly applied to the peculiar facts of this case, the expert evidence was insufficient.

2. The Seventh Circuit's ruling that the Plaintiffs' expert evidence presented was insufficient to create a genuine issue of material fact regarding whether Dr. Butler was subjectively aware that Mr. Cole intended to commit suicide is not in conflict with the decisions of the Eighth and Eleventh Circuits.

The Plaintiffs read the Seventh Circuit's opinion in this case as conflicting with those decided by the Eighth and Eleventh Circuits. The Plaintiffs cite *Miller v. Schoenen*, 75 F.3d 1305 (8th Cir. 1996) as support for their contention that other Circuits have allowed prisoners, pursuing claims under the Eighth Amendment, to challenge the doctor's denial of deliberate indifference by expert testimony. Even assuming the ruling in the Seventh Circuit was intended to restrict the methods of proof, the case cited by the Plaintiffs differs significantly on the facts.

In *Miller*, the plaintiff alleges specific inadequacies in his specialized medical care. Expert testimony on the specialized care needed by transplant patients and the inadequacy of the care received by the patient was enough to allow a reasonable jury to conclude that the patient had particular needs and the doctors failed to provide the specialized care.

Had the Plaintiffs challenged the appropriateness of Dr. Butler's classification, expert evidence on the obviousness of such misclassification may have been sufficient to allow the jury to make an inference that Dr.

Butler knew of the substantial risk of harm to Mr. Cole and subjectively disregarded that risk by failing to take reasonable measures to abate it. Such is not the case.

The Plaintiffs cite the Eleventh Circuit case of *Steele v. Shah*, 87 F.3d 1266 (11th Cir. 1996) as conflicting with the Seventh Circuit's holding. Again, the Seventh Circuit's holding in this case does not preclude prisoner plaintiffs to prove by expert evidence that the prison doctors acted with "deliberate indifference". Therefore, it is not inconsistent with the Eleventh Circuit's holding.

The Plaintiffs assert as additional support for granting their *writ* that under the Seventh Circuit's rule, prison doctors have achieved near total immunity from constitutional liability. The cases cited by the Plaintiffs address the distinction between "negligent treatment" and "deliberate indifference", and do not allow the constitutionalization of medical malpractice. *See*: *Snipes v. Detella*, 95 F.3d 586, 591 (7th Cir. 1996); *Steele v. Choi*, 82 F.3d 175, 178 (7th Cir. 1996), *cert. denied*, ___ S.Ct. ___ (1996). This Court has clearly held that merely negligent care would not rise to the level of an Eighth Amendment violation. *Estelle v. Gamble*, 429 U.S. 97, 105, 97 S.Ct. 285, 291-92 (1976).

Farmer set forth a stringent standard of proof for "deliberate indifference", but not one that is impossible to meet. There is no need for this Court to accept this case, as it has already been held that incarcerated individuals are entitled to the same usual methods of proof available to all other citizens. The Seventh Circuit has correctly applied the law as set forth in *Farmer* to the facts of this case and its ruling is not inconsistent with those of other circuits.

CONCLUSION

For the above reasons, the Petition for a Writ of Certiorari should be denied.

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FILED
JAN 22 1997
CLERK

No. 96-782

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1996

THE ESTATE OF MAX G. COLE, by its Administratrix Lois Pardue, AND LOIS PARDUE,

Petitioners,

v.

NANCY BUTLER, individually,

Respondent.

REPLY BRIEF OF PETITIONERS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

January 22, 1997

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Reasons for Granting the Writ

At this stage of the proceeding, Dr. Butler is not entitled to construe the facts in her own favor. For example, Dr. Butler claims she had no knowledge that plastic bags were available on the BU2 unit. Respondent's Brief at 2. But, the courts below agreed "a jury could reasonably find that she did know the bags were there." (a-24).[1] *See also* (a-4).

The evidence shows Dr. Butler kept Cole on "potential suicide" status for the entire time he was under her care. Pl. Ex. 16-19.[2] Plaintiffs' expert testified that plastic bags presented a substantial risk of serious harm to "potential suicide" patients:

> The danger presented by the plastic bags in the trash can and the laundry hamper on the BU2 unit [was] obvious and significant, and constituted a substantial risk of serious harm, and significant risk of death, to a "***potential suicide***" patient such as Mr. Cole.

Dr. Davis' Affidavit ¶¶ 4, at 3 (A-27) (emphasis added).

Dr. Butler tries to characterize Plaintiffs' claims as a challenge to how she classified Cole. Respondent's Brief

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[1]References to the appendix in the petition are denoted as a-____, and to the appendix in the Plaintiffs-Appellants' Brief, filed in the Seventh Circuit, as A-___.

[2]"Potential suicide" status is reserved for patients who "'exhibit or verbalize suicidal ideations.'" (a-19).

at 4. The question of whether Dr. Butler erred in classifying Cole as "potential suicide" patient is immaterial. Assuming she was absolutely correct in classifying Cole, the expert testimony still shows that she knowingly disregarded a "substantial risk of serious harm, and significant risk of death," by committing Cole to a unit where plastic bags were available to him. *Id.* Plaintiffs' expert evidence shows plastic bags presented a "substantial risk of serious harm, and significant risk of death" to a "'***potential suicide***'" patient. (A-27) (emphasis added).[3]

The Seventh Circuit has squarely held that the prisoners and pretrial detainees may not present evidence

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[3]That plastic bags were available on the unit pursuant to policy does not save the day. Dr. Butler was the medical director of the unit. *Butler's Depo.* at 5. She was also responsible for promulgating and approving the patient care policies, including the "potential suicide" precautions policy, at the unit. *See e.g.* Pl. Ex. 11. Thus, she is responsible for the policies under which she seeks refuge. Further, a state actor has no right to violate a citizen's constitutional right just because the actor is following the command of an employer. *Villanueva v. George*, 659 F.2d 851 (8th Cir. 1981) (defendants may not hide behind the cloak of institutional loyalty). Dr. Butler is as much liable under the fourteenth amendment as a police officer would be under the fourth amendment if the officer had unconstitutionally, albeit pursuant to a municipal policy, executed a search warrant.

contradictory to the self-serving testimony of a prison doctor who denies deliberate indifference:

> We cannot permit the factfinder to *infer* subjective knowledge of a substantial risk that Cole would harm himself based on Dr. Davis's testimony that the risk was "obvious" because this would conflict with Dr. Butler's subjective medical judgment, evidenced by her diagnosis, the appropriateness of which plaintiffs do not challenge.

94 F.3d at 261 (a-10).

The Seventh Circuit does not allow an "after the fact" opinion of a medical expert to be presented to contradict a prison doctor's self-serving denial of deliberate indifference. *Steele v. Choi*, 82 F.3d 176, 178 (7th Cir. 1996) ("after the fact" expert evidence disregarded), *cert. denied*, ___ S. Ct. ___ (1996). *See also Snipes v. Detella*, 95 F.3d 586, 591 (7th Cir. Sep. 9, 1996) (a prison doctor may not be held constitutionally liable for extracting the prisoner's toenail *without* local anesthesia), *cert. pet. pending*, No. 96-7058 (filed Dec. 9, 1996) (same counsel).[4]

Plaintiffs' expert, a Diplomate of the American Board of Psychiatry and Neurology, presented a reasoned

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[4]The decisions of the Seventh Circuit are in conflict with the decision of the Eighth and the Eleventh Circuits. *See* Petition at 9-10.

affidavit showing that the deadly danger of plastic bags is obvious and significant to psychiatrists and mental health workers. *Dr. Davis' Affidavit* ¶¶ 1-3, at 2-3 (A-26 to -27). Even Nurse Easton testified plastic bags are dangerous, especially, to patients on "potential suicide" status. *Easton's Depo.* at 20-21 & 35. *See also* United States Consumer Product Safety Comm'n, *Consumer Product Safety Alert* (Mar. 1990) ("from 1980 to 1987[,] 112 children died when plastic bags covered their faces"); Morgan and Priest, *Suicide and Other Unexpected Deaths among Psychiatric In-patients, The Bristol Confidential Inquiry*, 158 British J. of Psychiatry 368, 371 (1991) (listing asphyxiation with a plastic bag among the popular methods of suicide); Gale, et al., *A Study of Suicide in State Mental Hospitals in New York City*, Psych. Quarterly 201, 207 (Fall 1980) (suffocation).

The courts below should have allowed a jury to consider this evidence and decide whether to infer from it that Dr. Butler knowingly disregarded a substantial risk of serious harm to Cole. *See Farmer v. Brennan*, 511 U.S. ___, ___, 114 S. Ct. 1970, 1981 (1994) ("a factfinder may conclude that a prison official knew of a substantial risk from the very fact that the risk was obvious").

Yet, the Seventh Circuit held a jury may not be allowed to infer that Dr. Butler was subjectively aware of the risk based on the objective evidence that the risk was obvious and significant. This was error-- the precise error for which this Court reversed the Seventh Circuit in *Farmer*. "Whether a [defendant] had the requisite knowledge of a substantial risk is a question of fact subject to demonstration in the usual ways, including inference

from circumstantial evidence, and a factfinder may conclude that a prison official knew of a substantial risk from the very fact that the risk was obvious." 511 U.S. at ___, 114 S. Ct. at 1981 (cautioning against "confusing a mental state with the proof of its existence") (citation omitted). Without allowing such an inference, any defendant can take the stand, disclaim subjective knowledge of the obvious, and avoid liability altogether.

This Court should consolidate this case with *Snipes* and grant certiorari in both cases in order to resolve the conflict among the circuits and to explicitly hold that incarcerated individuals are entitled to present the same type of evidence which is available to all other citizens, to meet the stringent standard of proof set forth in *Farmer*.

Conclusion

For the foregoing reasons, Petitioners Estate of Max G. Cole and Lois Pardue respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

January 22, 1997

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